

**MINUTES OF THE MEETING OF THE
UNIFORM COMMERCIAL CODE COMMITTEE
OF THE STATE BAR OF CALIFORNIA**

November 12, 2002
9:35 a.m. to 12:15 pm.

The November 12, 2002 meeting of the Uniform Commercial Code Committee (the “Committee”) was called to order at approximately 9:35 a.m. with Peter Szurley and Pauline Stevens presiding.

A. Administrative Matters.

- 1. Welcome.** Peter Szurley welcomed Dena Cruz, the newest member of the Committee.
- 2. Appointment of Secretary.** Stephan Eberle was appointed as the secretary for the meeting.
- 3. Approval of October Meeting Minutes.** The minutes of the October 8, 2002 meeting were approved in the form disseminated prior to the meeting with the exception that Peter Szurley will communicate a few necessary edits to Gary Rosenbaum (the secretary for the October 8, 2002 meeting). Mr. Szurley noted that Vasco Morais volunteered to be part of the committees concerning the automation of the Secretary of State filing system and the UCC Committee web site.
- 4. Future Meeting Dates/Locations.** The Committee reconfirmed and established future meeting dates as follows:

December 3, 2002 (Tuesday), Videoconference, 9:30 a.m. at the offices of Morrison & Foerster in Los Angeles, San Francisco and San Diego.

January 3, 2003 (Friday), Videoconference, 9:30 a.m. at the offices of Morrison & Foerster in Los Angeles, San Francisco and San Diego.

February 4, 2003 (Tuesday), Videoconference, 9:30 a.m. at the offices of Morrison & Foerster in Los Angeles, San Francisco and San Diego.

March 11, 2003 (Tuesday), Videoconference, 9:30 a.m. at the offices of Morrison & Foerster in Los Angeles, San Francisco and San Diego.

April 4, 2003 (Friday), Los Angeles (Business Law Section Spring Meeting) – This meeting may conflict with ABA meetings. Peter Szurley will contact the ABA to determine when the best time for the Committee meeting will be. Mr. Sigman suggested the early evening might be the best time for the meeting because most ABA sessions end by the mid-afternoon.

B. CLE Programs.

1. BLS Spring Meeting. Mr. Szurley reported that the Committee has been asked to present a topic at the Business Law Section Spring Meeting (April 2003). He also reported that the State Bar will allow the Committee to present a topic other than “Corporate Governance and Ethics”, the theme for the presentations. Mr. Szurley asked for possible topics. Members of the Committee suggested the topic of opinion letters, due to the Committee’s work on that topic. Marty Fleisher, Pam Martinson and Peter Munoz volunteered to assist in preparing the presentation. Mr. Szurley will help coordinate with the State Bar.

2. BLS Annual Meeting. Mr. Szurley reported that the Committee must present a topic at the BLS Annual Meeting in September 2003. Mr. Szurley tabled the discussion on this until a later meeting.

C. Revised Articles/Divisions 3 and 4 Project.

The Committee reviewed and commented upon the draft reports/comments concerning the proposed amendments to California Commercial Code Articles/Divisions 3 and 4.

Mr. Szurley reported that he distributed immediately prior to the meeting an updated draft of the comments on the proposed amendments to section 3602. He asked that members provide comments to Mr. Szurley on that section by Wednesday, November 20, 2002.

1. Section 306-5. The Committee discussed section 3-605. The Committee focused primarily on the proposed addition of the non-uniform “safe harbor” language and the non-uniform provision concerning “elimination of barriers to effective rights of recourse.”

“Safe Harbor” – The Committee asked Professor Rosenberg to provide background on the proposal to add “safe harbor” language to section 3-605(j). Professor Rosenberg explained that the “safe harbor” language and discussion was included to avoid confusion later concerning what language would be necessary to provide an adequate retention of rights in a release. Mr. Sigman asked whether this might result in confusion if there were to be a deviation from the UCC, especially since the language in the proposed amendment is broader than the language in the UCC. Mr. Sigman also expressed a concern that people may interpret the proposed language as necessary (“magic”) language that would need to be followed precisely (Ms. Martinson echoed Mr. Sigman’s concern). Professor Rosenberg stated that the proposed amendment does make it clear that other language can be used. Professor Rosenberg also stated that this could be a first step in aligning the laws of suretyship. Mr. Sigman explained that the Committee’s general presumption should be to deviate from the national UCC text only if there is a compelling reason to do so.

“Elimination of Barriers to Effective Rights of Recourse” – Professor Rosenberg first discussed the proposed non-uniform amendment that would permit a creditor to provide financial

information about the principal obligor to a secondary obligor with the right of recourse against the principal obligor. Specifically, he thought it might be helpful to a secondary obligor, especially when it has no right to financial information from the principal obligor, to be able to obtain the financial information to assist it in enforcing its rights against the principal obligor. Ms. Martinson stated that she believes a secondary obligor should protect itself at the inception of the relationship rather than putting an additional burden on the creditor. Mr. Sigman echoed Ms. Martinson's point and also said that most debtors probably do not expect that their information will be disclosed other than pursuant to the terms of deal documents or through legal process. Ms. Stevens expressed a concern that the proposed amendment could result in unexpected liability for creditors.

After the two discussions of the non-uniform proposed amendments, upon a motion duly made, seconded and approved by all members except for Mr. Hellman and Mr. Orlick, the following resolution was approved:

RESOLVED: The Position Paper regarding Proposed Amendment to California Commercial Code section 3605 and Restated Amendment to sections 3103 and 3116 are approved without the two proposed non-uniform amendments.

2. **Section 3305.** Mr. Szurley recommended that the Comments to Proposed Amendments to California Commercial Code section 3305 be approved as presented. Upon a motion duly made, seconded and approved by all members, the following resolution was approved:

RESOLVED: The Comments to Proposed Amendments to California Commercial Code section 3305 are approved as presented.

3. **Section 3309.** Mr. Szurley asked that the Comment to Proposed Amendment to section 3309 be edited to provide additional explanation for the implementation of the amendment.

4. **Section 3312.** Mr. Szurley recommended that the Comments to Proposed Amendments to California Commercial Code section 3312 be approved as presented. Upon a motion duly made, seconded and approved by all members, the following resolution was approved:

RESOLVED: The Comments to Proposed Amendments to California Commercial Code section 3312 are approved as presented.

5. **Section 3602** The Committee discussed the proposed amendment to section 3602. Upon a motion duly made, seconded and approved by all members, the following resolution was approved:

RESOLVED: The Comments to Proposed Amendments to California Commercial Code section 3602 are approved as presented.

6. **Sections 3104, 3416, 4207, 4208** The Committee discussed the concepts presented in these sections. Mr. Sigman provided the Committee with the history behind the sections and allocation of risk in connection with demand drafts. The amendments to these sections will be included in the compiled Articles 3 and 4 Report that will soon be distributed.

Mr. Szurley asked that the Subcommittee for Revised Articles 3 and 4 compile the entire text for distribution to the Committee.

D. Revised Article 1 Project

The Committee discussed the Revised Article 1 Report. Mr. Szurley thanked Mr. Erskine and Ms. Stevens for their work on the report.

Mr. Sigman asked if the drafters could add into the introduction a general explanation about the reasons for the need for the revision and the adoption of the Article, including the need for uniformity in definitions.

Mr. Szurley then opened the discussion up to the Committee for comment. The comments included:

Section 1-201(b)(36) [Page 9] -- Mr. Szurley and Mr. Sigman asked whether the last sentence before the Recommendation is currently the Committee's position. Ms. Stevens noted that the current definition of "send" is inconsistent with the UCC and recommends the definition be changed to be consistent with the UCC. The Committee agreed. Therefore, upon a motion duly made, seconded and approved by all members, the following resolution was approved:

RESOLVED: California Commercial Code Section 1-201(b)(36) will be revised to be consistent with the UCC.

Section 1-201(b)(42) [Page 10] -- This sections concerns the definition of "warehouse receipts". Mr. Sigman stated that the Committee should be careful about changing this definition without determining the policy background for it. Ms. Stevens noted that the commentary for the section notes that following the UCC would have no material affect on the law and the only impact would be under the Evidence Code. Ms. Stevens will rewrite the commentary to state that the intent of the section is the same as under the previous section.

Section 1-302 (Choice of Law) – Mr. Sigman plans to distribute a revised draft shortly. However, because he may not be able to distribute a draft prior to the next meeting, he provided the following summary of the major changes:

-- In instances where the parties to a transaction have not made an effective choice of law, the parties' rights and obligations are determined by the law that would be selected by application of the forum state's conflict of laws principles rather than the "reasonable relation" test.

-- In instances where the parties to a transaction have made an effective choice of law, the “reasonable relationship” test is no longer factored into the analysis of what law applies. This should help decrease litigation over this point.

-- A choice of foreign law is only effective if the transaction is international.

-- The changes do not generally affect consumers, who are awarded the consumer law protections concerning choice of law.

-- There are fundamental policy exceptions.

Mr. Fleisher asked if the new choice of law provisions could be used to avoid more restrictive usury laws. Mr. Sigman replied that they would not because state statutes, and not the UCC, govern usury.

E. Website Review and Development Project

Mr. Szurley distributed copies of the current web site pages and lists of the current members. The Committee discussed that the site needs updating as soon as possible, including updated lists of the members. Mr. Szurley asked that a mailing list or listserv be part of the site.

Mr. Rosenbaum explained that the subcommittee had not had an opportunity to meet yet, but planned to shortly. Mr. Rosenbaum has been in contact with the person who controls the site to learn how to have new materials added to the site.

Mr. Szurley suggested that Committee members forward any suggestions or comments to Mr. Rosenbaum. He also suggested the site have a “tracking legislation” section and have the Committee minutes added periodically.

F. Legal Opinions Task Force

Mr. Fleisher reported that the goal of the subcommittee is to distribute a rough draft shortly after January 1, 2003 and to have it publishable after comment by April 2003.

Mr. Szurley noted that he recently distributed the Tri-Bar Opinion Committee report to the Committee. He asked if the subcommittee should contact Steve Weiss to coordinate any variations between the subcommittee’s draft and the Tri-Bar report. Mr. Fleisher believes the subcommittee should contact Mr. Weiss and the Tri-Bar Committee.

A Committee member asked if there were major differences between the Tri-Bar Report and the approach the subcommittee is taking. Mr. Szurley noted that there are a few fundamental differences between the approaches, including that the Tri-Bar Committee is embracing “implied opinions” which is something the California subcommittee is not embracing.

G. Secretary of State Automation Project

Ms. Stevens asked if the subcommittee is following up on the issues raised at the October meeting. Mr. Szurley had been in contact with Kathleen Vasquez of the Secretary of State's office who told him the Secretary of State is currently meeting with other parties and will contact the Committee after January 1. Mr. Szurley expressed a concern that the Committee may be left out of the development process unless it continues to actively participate in the process. Mr. Sigman expressed a similar concern and suggested the Committee send a letter to the Secretary of State emphasizing the significance of the project to the State Bar and the UCC Committee and ask to be included before major decisions are made.

Mr. Morais stated that he and Mr. Kraft had been in contact with Ms. Vasquez and would initiate regular contact with her.

Mr. Sigman asked that the subcommittee continue to communicate with the Secretary of State to ensure that there is a capability to search the index of parties.

H. Article 9 Update

The Committee discussed section 9408(d) of the California Commercial Code. Specifically, Mr. Szurley noted that the Committee's report on Revised Article 9 indicated that that section was originally to be the same as the uniform version; however, in its enactment, the section changed. No one had additional information to provide on this topic. Mr. Szurley indicated that he would separately try to get more information.

The Committee discussed two recent Attorney General opinions that came out relating to digital signatures, where the A.G. concluded that digital signatures did not need to be accepted by the government office to which the documents with the signatures were submitted/filed. The California Records Association is drafting proposed legislation to assist in overturning the A.G. opinion. The Committee has been asked if it is interested in assisting in the process. The Committee tentatively decided that, while it would track any legislation, it was probably not the right entity to take a lead role. Mr. Szurley indicated that he would check to see if another BLS Committee would be interested in tackling the subject.

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The meeting was adjourned at approximately 12:15 p.m.